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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1201

GEORGE W. CROCKER,

Petitioner,

—v.—

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND THE MINNESOTA CIVIL LIBERTIES UNION, AMICI CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

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Interest of Amici

In this case, petitioner was convicted under the Military Selective Service Act of 1967 of refusing to submit to induction into the armed forces. Among other grounds raised on appeal, petitioner claimed that the Act was unconstitutional. The conviction was affirmed by the Court of Appeals for the Eighth Circuit.

Amici file this brief* to urge the Court to grant the petition so that it might closely examine the asserted con-

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* The written consents of the parties have been filed with the Clerk of the Court.

stitutional foundation of the Military Selective Service Act of 1967. Amici believe that such a close examination, together with a re-examination of the basis for decision in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), will reveal an absence of constitutional authority for peacetime conscription. This brief summarizes the results of historical research which has led amicus to conclude that the Founding Fathers did not intend, in drafting the Constitution, to empower the government to impress man into military service in peacetime. We believe it will be of substantial interest to the Court.

Reasons for Granting the Writ

Today there are few more vital issues in the relationship between man and his government than the asserted right of the state to demand military service from its citizens and the asserted duty of all able-bodied men to respond to that claim. Yet, despite the importance of this problem, it has been fully examined by this Court only once, in the *Selective Draft Law Cases* (*Arver v. United States*), 245 U.S. 366 (1918), a case now fifty-two years old. Further, the *Arver* case reviewed the problem only in a war-time setting, after a solemn declaration of war had been made by Congress. More important, the case rested on the most dubious historical and legal evidence. Only three pages of the Government's brief and one paragraph of the defendants' briefs were devoted to the intentions of the men who framed the Constitution as revealed at the Philadelphia and state conventions, traditionally the most important source of constitutional interpretation. Thus the Court's decision ignored crucial historical evidence that the framers

of the Constitution did not intend to give Congress the power to conscript directly.

This case will therefore present to this Court for the first time a challenge to the constitutionality of federal conscription in peacetime, based upon a comprehensive historical analysis of the framing and adoption of the Constitution. Although 183 years have passed since the Philadelphia Constitutional Convention, no detailed study of the framers' intention and purpose concerning the military clauses has been passed upon by any federal court, least of all the Supreme Court. This case attempts to correct that omission.

It is impossible in this short amici brief to cite all the historical evidence bearing upon the question of peacetime conscription.[1] What follows is a brief outline of the material which will be fully developed by the amici if certiorari is granted.

I.

1. The framers of the Constitution considered a standing professional army the greatest danger to liberty. The overreachings of the royal armies during the later Stuart period of England[2] as well as the behavior of British

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[1] A recent article by one of the counsel for amici herein indicates the type of material which will be presented by amici if certiorari is granted. See Friedman, "Conscription and the Constitution: The Original Understanding," 67 *Michigan Law Review* 1493 (1969).

[2] Proposals to conscript for the British regular army were advanced in Parliament in 1704 and 1707 but were firmly rejected. See Freeman, "The Constitutionality of Peacetime Conscription," 31 Va.L.Rev. 40, 68-69 (1944). Conscription was never in force in England until 1916, except for limited militia service which was carefully restricted. See Friedman, *op. cit.*, 1499-1503.

troops in the colonies before the Revolutionary War convinced the American statesmen that strict control over the military was a vital safeguard against tyranny. In the same vein the colonial leaders were wary of lodging too much power in any central government which could trample on the liberties of the people. Thus even during the Revolution, Congress refused to implement any scheme of federal conscription and relied instead on a system of quotas and levies from the state militia forces to fill out the Continental army.[3] The quota system was cumbersome and unreliable since the states were slow to supply men and could not be compelled to do so. Since the states also fell behind in making payments to the central treasury, the Continental Congress was hamstrung in its efforts to keep up and control its own military forces.

2. The revolutionary experience led the leading colonial statesmen to conclude that a stronger central government with the power to control its own army was vital for national defense. On the very first day of the Philadelphia Constitutional Convention in 1787, Edmund Randolph, leader of the Virginia delegation, complained that the Confederation could not defend itself and a new system of organizing the government was necessary. Randolph introduced a new plan which became the skeleton of the new Constitution. But Randolph made clear in his speech intro-

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[3] Thomas Jefferson expressed the prevailing sentiment in the states against conscription in a letter to John Adams, dated May 16, 1777:

> Our battalions for the Continental service was sometime ago so far filled as rendered the recommendation of a draught from the militia hardly requisite. And the more so as in this country it ever was the most unpopular and impracticable thing that could be attempted. Our people under the monarchial government have learnt to consider it as the last of all oppressions. 2 *Papers of Thomas Jefferson* 18 (J. Boyd ed. 1950).

ducing the so-called Virginia plan, that it did not give the federal government carte blanche in organizing its army. He said:

> "What reason to expect that the Treasury will be better filled in future, or that money can be obtained under the present powers of Congress to support a war. *Volunteers* not to be depended on for such a purpose. *Militia* difficult to be collected and almost impossible to be kept in the field. *Draughts stretch the strings of government too violently to be adopted.* Nothing short of a military force will answer the end of war, and this only to be created and supported by money."
>
> 1 Farrand, *Records of the Federal Convention* 25 (1911) (Emphasis supplied.)

Thus on the very first day of the Convention, Randolph, an initiator of the Constitution, excluded the power of the federal government to draft. As a strong Federalist figure who wished to give the new central government wide powers, Randolph's denial of that authority is especially significant. He and other Federalist figures were anxious to grant the new government the right to enlist its own army, a power which it lacked under the Confederation. Many Antifederalist leaders, remembering the dangers of a peacetime professional military force, wanted to rely only on the state militia and saw no need for any kind of national army. The debate at the Convention and during ratification centered on the lesser alternative of enlistment of a federal force, which many thought was unnecessary. *A fortiori*, the power to draft was unthinkable to the statesmen of the time.

3. *The Federalist Papers*, written by Madison and Hamilton confirm that the militia was to be the main

military force. A small professional force was required only to repel a sudden invasion until the militia could be mobilized. A federal army would also guard the frontiers. But Madison and Hamilton made clear that the people at large would satisfy their military obligations only through the militia which could be federalized only under limited conditions and not in a regular army.[4]

4. In the state ratifying debates, the impossibility of conscription was reflected in many ways. The Anti-federalists opposed the Constitution because it gave the federal government the power to tax but they never complained of the power to conscript. In discussing the military clauses, these critics stated that the citizens at large could be taken into the militia and then made subject to court martial jurisdiction.[5] No such complaint was made about the power to raise armies since no one thought any citizen could be taken into the regular army against his will.

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[4] In Federalist No. 24, Hamilton wrote about the frontier forts:

"These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government. The first is impracticable; and if practicable, would be pernicious. The militia would not long, if at all, submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace. And if they could be prevailed upon, or compelled to do it, the increased expense of a frequent rotation of service and the loss of labor, and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme. It would be as burthensome and injurious to the public, as ruinous to private citizens. The latter resource of permanent corps in the pay of government amounts to a standing army in time of peace; a small one, indeed, but not the less real for being small." (J. Cooke ed. 1961, at pp. 156-157)

[5] See particularly the debates in the Maryland convention, 2 J. Elliott, Debates (2d Ed. 1836) at 552.

Many antifederalists introduced amendments to limit the term of enlistments but never suggested any restriction on conscription.[6] All of these attacks on the Constitution were predicated on the assumption that no power to draft existed in the federal government. Furthermore, the delegates in the state ratifying conventions often identified the military powers under the new Constitution as identical to those under the old Confederation which admittedly had no power to conscript.[7]

5. The First Congress, composed of many of the founding fathers, also showed that it did not contemplate any federal power to conscript. Madison introduced a conscientious objector clause in the Bill of Rights, but it would have protected only militiamen and not regular army soldiers.[8] If he thought the citizens at large could be taken into the federal army, he would surely have suggested similar protection in that situation. The Second Amendment itself which sought to protect the state militia from being destroyed by the federal government is inconsistent with any federal power to conscript. Many comments of individual Congressmen also support this view.[9]

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[6] 2 Debates 552, 4 *id.* at 245, 3 *id.* at 660.

[7] 2 Debates 352, 468, 537.

[8] 1 Annals of Congress, 1st Cong., 434.

[9] See, e.g., remarks of Elias Boudinot, once President of the Continental Congress and in 1789 a Representative from New Jersey, who defended the conscientious-objector clause. "In forming a militia," he said, "an effectual defence ought to be calculated, and no characters of this religious description ought to be compelled to take up arms." He added that "by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms." 1 *Annals of Congress*, 1st Cong., 767. Since the clause in question related only to the militia, Boudinot's concern for the protection of con-

6. The *Selective Draft Law Cases* of 1918 did not have all this historical evidence before it. Instead, the Supreme Court cited the universality of conscription in 1918 and the supposed existence of conscription in England and the colonies as support for the view that the federal government could draft. But in 1789 when the Constitution had been adopted, no country in the world had exercised the power to conscript its citizens as a whole.[10] In England and the colonies, a militia system had been instituted, but it had no relation to a modern draft. The militia was thought of as the whole body of male citizens who were expected to own a weapon, enroll, appear for training sessions and help defend their community when emergencies arose. But generous provisions existed for substitutions or payment of militia fines in lieu of service. The militia was thought of as a local defensive unit which would not be sent out of its organizing county or colony. It could be called into service only under specified conditions. In England practically no one had to serve in the militia against his will and in the colonies most compulsory elements in the militia were fading in the years before the Revolutionary War.[11] The Constitution recognized the continued status of the state militias and provided that they could be federalized only in the three instances found in Clause 15 of Article I, Section 8.

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scientious objectors would be meaningless if Congress had the power to conscript for the regular army. For in that case the general government would be able "to compel all its citizens [including conscientious objectors] to bear arms," a power which Boudinot was denying.

[10] See Freeman, *op. cit.* at p. 68.

[11] See Friedman, *op. cit.* 1502-06.

7. The Supreme Court in 1918 also relied on the fact that a conscription plan was introduced into Congress (but not passed) during the War of 1812 and was enacted during the Civil War. But the important point about the 1814 proposal to draft was that it was not accepted by Congress even though the nation had been invaded and the very capital occupied. Senators Jeremiah Mason and David Daggett[12] and Representative Daniel Webster insisted that the federal government had no power to conscript. Webster said:

> "Is this, Sir, consistent with the character of a free Government? Is this civil liberty? Is this the real character of our Constitution. No, Sir, indeed it is not. The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure and their own blood a Magna Carta to be slaves. Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents, and parents from their children and compel them to fight the battles of any war, in which the folly or the wickedness of Government may engage it? Under what concealment has this power lain hidden, which now for the first time comes to trample down & destroy the dearest rights of personal liberty?" [13]

8. During the Civil War, the first federal conscription law was passed. However, opposition to the law was widespread. Only six per cent of the Union forces were

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[12] *Annals of Congress*, 13th Cong., 3rd Sess. 80, 72.

[13] 14 The Writings and Speeches of Daniel Webster 57 (1903).

drafted. Many statesmen and judges still doubted federal power to draft. Chief Justice Roger Taney wrote a proposed opinion declaring the Enrollment Act unconstitutional,[14] but he never had the opportunity to deliver it. The Pennsylvania Supreme Court held initially that the law was invalid, but the replacement of one of the judges brought about a reversal of that decision.[15]

9. The draft of World War I was also attacked by many critics. But the patriotic pressures of the times made impossible any serious inquiry into Congressional military power. However, the World War I draft took place after a Congressional declaration of war and is not a precedent for peacetime conscription.

10. It is an axiom of constitutional interpretation that the intent of the Constitution-makers must prevail. The frequently cited opinion of Chief Justice John Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) does not undercut that principle. Marshall indicated that the framers intended the necessary and proper clause to be read broadly and that the traditional means of exercising the powers enumerated in the Constitution and those logically necessary from the express powers enumerated should be available to Congress. However, any power specifically excluded by the framers cannot be utilized.[16]

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[14] 18 Tyler's Quarterly Historical and Genealogical Magazine 79 (1939).

[15] *Kneedler* v. *Lane*, 45 Pa. 238 (1863).

[16] See, e.g., concerning a broad reading of the judicial power, *Popovici* v. *Agler*, 280 U.S. 379, 380 (1930).

11. Furthermore, this Court has consistently refused to restrict any personal rights more narrowly than the framers intended. As was recently noted in *Schneider* v. *Smith,* 390 U.S. 17, 25 (1968), "the purpose of the Constitution and the Bill of Rights . . . was to take government off the backs of people." This Court has suggested in many of its opinions that there is a minimum distance which must be maintained between government and the citizen, between authority and the people.[17] That minimum distance is defined not only by the Bill of Rights, but by the checks and balances within the government, by the separation of powers between the different arms of government, and by the limited grant of authority in the Constitution to the government. It is clear that the military clauses were intended to be not only a *grant* of power but a *restriction* of power, a restriction to protect the citizen against arbitrary government action. That intent of the framers must be given effect by this Court.

12. In many parallel instances in recent years the Court has reexamined the intent of the framers in the field of personal rights and denied the government certain powers which it had claimed and had exercised for many years. The decisions rested in part on an historical analysis of the framers' intent. Thus the power of Congress to exclude members-elect was restricted in *Powell* v. *McCormack,* 395 U.S. 486 (1969); its power to denationalize citizens who voted in foreign elections was overturned in *Afroyim* v. *Rusk,* 387 U.S. 253 (1967); the power of the military to try soldiers in peacetime for non-service connected crimes eliminated in *O'Callahan* v. *Parker,* 395 U.S. 258 (1969).

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[17] See, e.g., *United States* v. *Brown,* 381 U.S. 437 (1965); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965).

In each case what appeared to be the original understanding of the framers was restored.[18]

13. Amici have argued thus far that this Court should grant certiorari in order to consider the substantial historical evidence, never previously brought to the attention of this Court, that the original understanding of the Constitutional framers was that the power to raise armies was never intended to include the power to conscript. Amici also urge that regardless of how the early constitutional and post-constitutional history may be evaluated, there is such a considerable difference between the exercise of the power to conscript in wartime, and its exercise in peacetime, that this Court should in any event grant certiorari to determine whether the present peacetime draft is within the constitutional power of Congress. This Court has never ruled on the constitutionality of a peacetime draft. In *Hamilton* v. *University of California,* 293 U.S. 245 (1934), the power to draft in wartime was assumed. However, Mr. Justice Cardozo, in his concurring opinion, observed:

> "There is no occasion at this time to mark the limits of governmental power in the extraction of military service when the Nation is at peace." 293 U.S. at 265.

A similar observation was made by Mr. Justice Douglas dissenting from the denial of certiorari in *Holmes* v. *United States,* 391 U.S. 936 (1968), and *Hart* v. *United States,* 391 U.S. 956 (1968). See, also, separate memorandum of Mr. Justice Stewart in *Holmes* v. *United States, supra,* and, dissenting opinion of Mr. Justice Douglas in *United States* v. *O'Brien,* 391 U.S. 367, 389-390 (1968).

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[18] See also *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 72-73 (1938) which overruled *Swift* v. *Tyson,* 16 Pet. 1 (1843) in part because of new historical evidence concerning the intent of the framers.

14. A review of the decisions customarily cited as upholding Congressional power to conscript discloses that in each of them the constitutional power was premised on an actual or contemplated Congressional declaration of war.

(a) The most significant decision is the *Selective Draft Law Cases,* 245 U.S. 366 (1918), upholding World War I conscription. It is unmistakably premised on the constitutional legitimacy of

> "... the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the Nation as the result of a war declared by the great representative body of the people ..." 245 U.S. at 390.

(b) In *United States* v. *Macintosh,* 283 U.S. 605 (1931), this Court held that Congress could properly deny naturalization to an alien who refused to take an unqualified oath to serve "in the armed forces of the nation in time of war ..." 283 U.S. at 623. The entire discussion of Congressional power in *Macintosh* contemplates Congressional power to compel military service in connection with a declaration of war. *Id.* at 622. In *Macintosh* the Court listed a large number of emergency powers which could be exercised by Congress "to the end that war may not result in defeat ..." *Ibid.* Finally, this Court made it clear that it regarded the war powers to include "by necessary implication, the power, *in the last extremity,* to compel the armed services of any citizen in the land ..." 283 U.S. at 624 (emphasis added). Nothing which this Court said in *Macintosh,* or in the *Selective Draft Law Cases,* provides constitutional justification for a peacetime draft. The "last extremity" obviously has not been reached at a time where there has been no declaration of war.

(c) Another case often cited, *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29 (1905), asserts congressional power to compel military service for the country notwithstanding the risk "of being shot down in its defense," again obviously a reference to wartime service.

(d) Wartime decisions of lower federal courts are in accord. See *Heflin* v. *Sandford,* 142 F.2d 798, 800 (5th Cir. 1944) ("The present war is described by its author as 'total war' meaning that every means of destruction will be used, and men, women and children alike killed. It means, also, that total effort may be necessary to resist it, men, women and children all doing what they can."); *United States ex rel. Zucker* v. *Osborne,* 54 F. Supp. 984, 986 (W.D.N.Y. 1944) ("We are not concerned with the power to conscript individuals in time of peace. We are concerned with that power in time of war.").

15. Decisions of this Court at the time of World War II and subsequent thereto which have asserted or reiterated the constitutional power to conscript have likewise referred explicitly and implicitly to a wartime draft. See *Lichter* v. *United States,* 334 U.S. 742, 755-758 (1948) (upholding the Renegotiation Act as "part of a national policy adopted in time of crisis in the conduct of total global warfare . . . ."); *Ex Parte Quirin,* 317 U.S. 1, 25 (upholding the validity of special wartime commission to try enemy spies as within Presidential power "as Commander-in-Chief of the Army in time of war and of grave public danger . . . "). In *United States* v. *O'Brien, supra,* this Court again asserted that the Constitutional power of Congress to raise and support armies includes the power "to classify and conscript manpower for military service . . .," 391 U.S. at 377, citing as authority for this power the prior decisions of this Court

in *Selective Draft Law Cases, supra, Lichter* v. *United States, supra,* and *Ex Parte Quirin, supra.* Since the decision in *O'Brien* contains no discussion or analysis whatsoever of the constitutional distinctions between wartime draft and peacetime draft, it is plain that the *O'Brien* decision is no more a precedent for the legitimacy of peacetime conscription than the earlier cases discussed previously.[19]

16. Review by this Court of the differing perimeters of constitutionality of wartime and peacetime conscription is vital because of the acknowledged total impact which conscription has upon the individual. It is hardly debatable that compulsory military service, whether in time of war or peace, is always a severe deprivation of civil liberties. Assuming that this deprivation is constitutionally tolerable "in the last extremity," see *Hamilton* v. *University of California, supra,* the question which has not yet been answered is whether such a totality of deprivation of liberty in peacetime exceeds constitutional limits. The liberties involved have all been recognized by this Court as constitutionally protected in other contexts. Conscription obviously affects one's right of movement, residence and travel.

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[19] In *United States* v. *O'Brien,* this Court upheld, as within the constitutional power to conscript, the validity of a statute penalizing willful destruction or mutilation of a selective service registration certificate. It does not implicitly follow that in upholding the constitutionality of requiring possession of a peacetime draft registration certificate, the Court simultaneously upheld the constitutionality of peacetime conscription. There is considerable difference between compelling registration in peacetime for possible wartime conscription, and in actually ordering someone conscripted in peacetime. The recent *Report of the President's Commission on an All-Volunteer Armed Force* (February 1970) (the Gates Commission) recommended a volunteer armed force in peacetime, and a structure for quickly reinstituting a standby draft in time of war or other national emergency, including, specifically, "A register of all males who might be conscripted when essential for national security." Report, p. 119.

See *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Edwards* v. *California,* 314 U.S. 160 (1941). Conscription precludes the right to engage in one's chosen profession. See *Truax* v. *Raich,* 239 U.S. 33 (1915); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). It is a deprivation of property, since it imposes a form of in kind taxation on a selected group of young men rather than by financial taxation of the nation as a whole to pay the actual economic value of the conscripted services. See Report of Gates Commission, *supra,* Chapter 3, "Conscription Is a Tax", *passim.*[20] See also Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* 17-29,

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[20] "Draftees and draft induced volunteers in such a force are coerced into serving at levels of compensation below what would be required to induce them to volunteer. They are, in short, underpaid. This underpayment is a form of taxation." Report of Gates Commission, at 23-24. "Under conscription, each inductee and reluctant volunteer is compelled to render services to the government. He is required to pay a tax—a tax paid (and collected) in kind rather than cash—but the form of the payment does not alter the substance of the relationship. The amount of the tax is the difference between the pay that the inductee or reluctant volunteer actually receives as a first-term serviceman and the pay that would be required to induce him to enlist." *Id.* at 24-25. "What is of questionable morality is the discriminatory form that this implicit tax takes; and even more, the abridgement of individual freedom that is involved in collecting it." *Id.* at 27. "Is it right and proper that a large tax be confined to a small fraction of our young able-bodied males in order to relieve taxpayers in general from having to pay high taxes?" *Id.* at 27-28. "It is unlikely that any Congressman would ever propose enactment of a general tax of the kind now imposed by the draft. If one ever were proposed, it would have little chance of being approved by Congress. If approved by Congress, *it is hard to imagine that it would be held constitutional by the courts.* This is a hidden tax which persists only because it is obscure. No tax is perfect, of course, but it is hard to imagine a means of imposing the cost of defense, or any other Government activity for that matter, more in conflict with accepted standards of justice, equality and freedom in the United States." *Id.* at 28. (Emphasis added.)

57-59 (1967). Furthermore, compulsory military service infringes on freedom of speech and association, since persons in the military are obviously held to a more restricted standard than persons in civilian life. See *United States* v. *Howe,* 17 USCMA 165, 37 CMR 429 (1967). Likewise, a person drafted into the armed services becomes subject to military law, as well as to military commands, and is thereby deprived of many constitutional safeguards which are not provided in the Uniform Code of Military Justice, 10 USC §§801, et seq., including principally trial by jury. See *O'Callahan* v. *Parker,* 395 U.S. 258 (1969).

In addition, it makes the individual, regardless of his wishes, an instrument of foreign and military policy with which he may disagree, either generally or specifically. Yet he has no choice but to obey his military orders requiring him to be such an instrument.[21]

No citations are needed to emphasize the most egregious deprivations effected by a military draft: severe bodily injury, maiming for life, and in many cases death. Perhaps the only thing which might be more severe than deprivation of life, is requiring an individual to become a killer of others. This is the ultimate deprivation of liberty imposed by a military draft.[22]

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[21] "By handing boys over to the arbitrary and complete domination of the Government, we put it in the power of the Government to indoctrinate them with political doctrines then popular with the Government. In wartime it is bad enough; in peacetime it would be intolerable." Senator Robert A. Taft, quoted in statement by Rep. Lindsay, 110 Cong. Record 8575-6 (April 21, 1964).

[22] Statutory provisions exempting conscientious objectors from compulsory military service may satisfy the constitutional guarantee of religious liberty for those judged to meet the statutory requirements. But for all persons, conscientious objectors or otherwise, it cannot be doubted that when the government "orders citizens to kill or die, it comes close to the limits that even Hobbes put down around the authority of Leviathan." Christian Bay, quoted in Kaufman, "The Selective Service System," in Finn (ed.), A Conflict of Loyalties 252 (1968).

17. The due process clause of the Fifth Amendment protects "certain fundamental personal liberties from abridgment by the federal government", *Griswold* v. *Connecticut,* 381 U.S. 479, 492 (1965) (concurring opinion by Mr. Justice Goldberg). If these personal liberties protected by the Fifth Amendment include freedom of travel, *Aptheker* v. *Secretary of State, supra;* right of privacy, *Griswold* v. *Connecticut, supra;* right to employment, *Truax* v. *Raich, supra;* right to attend private religious school in lieu of public school, *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925); and right to instruction in a foreign language, *Meyer* v. *Nebraska,* 262 U.S. 390, 399-400 (1923); then *a fortiori,* the Due Process Clause must include the protection of a fundamental personal liberty which is infinitely more dear, the liberty to be free from compulsory military service in the absence of a declaration of war and ultimately to be free of the risk of death and the compulsion to kill others.

18. As encompassing as the war power undoubtedly is, it is equally clear that the Constitution places limits on its exercise. It is axiomatic that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." *United States* v. *Robel,* 389 U.S. 258, 263 (1967). The due process clause is a limitation on all Governmental power, "even the warpower," *Galvan* v. *Press,* 347 U.S. 522, 530 (1954); "The exercise of the warpower . . . is subject to the Fifth Amendment." *Hamilton* v. *Kentucky Distilleries and Warehouse Company,* 251 U.S. 146, 155 (1919). See *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963); *Harmon* v. *Brucker,* 355 U.S. 579 (1958); *Reid* v. *Covert,* 354 U.S. 1 (1957); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); *United States* v. *Cohen Grocery Company,* 255 U.S. 81, 88 (1921).

19. Attempts by the legislature or the executive to exercise extraordinary powers posited on the existence of a wartime emergency have been subject to judicial review of whether the emergency exists or, once having existed, still persists. This Court has exercised such power of judicial review as far back as the Mexican War. See *Mitchell* v. *Harmony,* 13 How. 115, 134 (1851), where Chief Justice Taney, in reviewing the propriety of a certain taking of property by a military expedition, reviewed the law and concluded "that in all of these cases, the danger must be immediate and pending . . . it is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified." Accord: *United States* v. *Russell,* 80 U.S. 623, 628 (1871) ("Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified."). In *United States* v. *Macintosh,* 283 U.S. 605, 622 (1931), this Court was clear in its statement that the entire panoply of enormous war powers might be invoked by Government, but only "when necessity calls for its exercise. . . ."[23]

In *Hamilton* v. *Kentucky Distilleries and Warehouse Company,* 251 U.S. 146 (1919), Mr. Justice Brandeis, for a unanimous court, concluded that the World War I Prohibition Act, enacted pursuant to the exercise of wartime emergency powers, was not constitutionally deficient even

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[23] The *Macintosh* majority listed among the war powers: restrictions on freedom of speech and press and trial by jury; confiscation of property without compensation; fixing of prices; taking over of railroads; ". . . and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war." 283 U.S. at 622.

though the war was over because wartime emergency economic conditions still persisted. Nevertheless, the entire court conceded the principle "that the question of the continued validity of the War Prohibition Act under the changed circumstances depends upon *whether it appears that there is no longer any necessity* for the prohibition of the sale of distilled spirits for beverage purposes. . . ." *Id.* at 163. (Emphasis supplied.) "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed." *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, 547-48 (1924). Chief Justice Warren has cited a decision of the Supreme Court of Australia, *Illawara District County Council* v. *Wickham,* 101 Commw. L.R. 467 (1959) as "invalidating a far-reaching veterans preference statute on the grounds that with the World War II emergency past, the war-power justification for such laws, under the Australian Constitution, had ceased." Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* 110, n. 50 (1963).

This Court has held that "The conscription of manpower is a more vital interference with the life, liberty and property of the individual than is the conscription of his property or his profits or any substitute for such conscription of them." *Lichter* v. *United States,* 334 U.S. 742, 756 (1948). Amicus respectfully urges that this Court can be no less concerned with reviewing the constitutional basis for the peacetime exercise of manpower conscription than it has been for the peacetime exercise of property conscription. Certiorari should be granted for the reason best stated by former Chief Justice Warren in his James Madison Lecture:

> "... if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum."

Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* 102 (1963).

20. This Court has instructed that where a Governmental regulation impinges on individual liberties, it is incumbent upon Government "to demonstrate that no alternative forms of regulation," *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963) were available. For a dramatic application of this principle, see *In Re Jenison*, 265 Minn. 96, 120 N.W.2d 515 (1963), reversed and remanded 375 U.S. 14 (1963); decision modified in accordance with remand order, 265 Minn. 136, 125 N.W.2d 588, 589 (1963). It is self-evident that a constitutionally acceptable alternative to raising an army by compulsory military service is raising an army by voluntary military service. See Report of Gates Commission, *supra*, Chapter One, "Protecting the Free Society," *passim*. To repeat, neither this question nor any of the other constitutional questions involved in a peacetime draft have ever been decided by this Court.[24] As Mr. Justice Douglas wrote:

> "It is an important question. It is a recurring question. It is coming to us in various forms in many cases as a result of the conflict in Vietnam. I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for con-

[24] See Report of Gates Commission, *supra*, at 166.

scription an answer to this important undecided constitutional question."

Holmes v. *United States*, 391 U.S. 936, 20 L.Ed. 2d 856, 864 (1968). "The enemy is not yet so near our gate," *United States* v. *Nugent*, 346 U.S. 1, 13 (1953) (dissenting opinion of Mr. Justice Frankfurter) that traditional constitutional safeguards may be "overborne by military exigencies."

CONCLUSION

For the foregoing reasons, amici respectfully urge that the petition for certiorari be granted.

Respectfully submitted,

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